

Ace Galvanizing, Inc. and James A. Douvier. Case
19-CA-7286

March 27, 1975

DECISION AND ORDER

BY MEMBERS JENKINS, KENNEDY, AND PENELLO

Upon a charge filed August 28 and amended September 30, 1974, by James A. Douvier, an individual, the General Counsel of the National Labor Relations Board, by the Regional Director for Region 19, issued a complaint on October 7, 1974, against Respondent, Ace Galvanizing, Inc.

The complaint alleged that Respondent violated Section 8(a)(1) and 8(a)(5) of the Act¹ by its refusal to pay as severance pay wages in lieu of accrued sick leave which had accrued to employees pursuant to the terms of an expired labor agreement prior to the date on which Respondent put into effect its "last and best offer." Respondent denied the material allegations of the complaint.

On December 2, 1974, the parties entered into a Stipulation of Facts for Submission to the Board. By the terms of the stipulation, the parties agreed to transfer the proceeding to the Board, to waive a hearing before an Administrative Law Judge and the issuance by him of a decision and recommended order, and to submit the case for findings of fact, conclusions of law, and order directly by the Board based on a record consisting of the formal papers, stipulation of facts, and the attached exhibits. On December 10, 1974, the Board approved the parties' stipulation, and ordered that the proceeding be transferred to the Board. Thereafter, the Respondent and General Counsel filed briefs.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

Upon the basis of the stipulation, including the exhibits, the briefs, and the entire record in this proceeding, the Board makes the following:

FINDINGS OF FACT

I. THE BUSINESS OF THE EMPLOYER

Respondent, Ace Galvanizing, Inc., is a Washington corporation engaged in the business of galvanizing metal objects in Seattle, Washington. Respondent, during the past 12 months, made out-of-state sales and purchases each in excess of \$50,000. We find the Re-

¹ The complaint originally alleged violations of Sec 8(a)(1), (3), and (5). By letter dated October 22, 1974, the Regional Director approved Douvier's request for withdrawal of the 8(a)(3) allegation.

spondent is, and at all material times has been, engaged in commerce within the meaning of Section 2(6) and (7) of the Act and that it will effectuate the purposes of the Act to assert jurisdiction herein.

II THE LABOR ORGANIZATION INVOLVED

International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America, Local Union No. 174, is, and at all times material herein has been, a labor organization within the meaning of Section 2(5) of the Act.

III THE UNFAIR LABOR PRACTICES

The parties' stipulation shows these facts:

On or about May 1, 1970, Northwest Galvanizing Company² entered into a labor agreement with International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America, Local Union No. 174,³ the duly recognized exclusive bargaining agent of Northwest's production and maintenance employees.⁴ The collective-bargaining contract expired on April 30, 1973.

In May 1972, Respondent purchased the assets of Northwest and assumed the obligations and responsibilities of Northwest under the collective-bargaining contract as a successor employer.

The following provisions included in the May 1970 collective-bargaining contract are relevant to the issue raised in this proceeding:

ARTICLE XVII

Sick Leave

3. EFFECTIVE May 1, 1972: All regular employees shall accumulate sick leave pay at the rate of one (1) day (eight (8) hours) per month.

ARTICLE XVII

7. In the event an employee is discharged or terminates his employment, all the accumulated sick leave shall be paid to the employee as severance pay.

From May 1, 1973, to January 7, 1974, the Respondent and the Union met in several negotiating sessions and utilized the services of a mediator from the Federal

² Herein called Northwest

³ Herein called the Union.

⁴ The collective-bargaining agreement covered the following appropriate unit

All production and maintenance employees at the Employer's facility at 429 South 96th Street, Seattle, Washington, excluding office clericals, professional employees, guards, and supervisors as defined by the Act.

Mediation and Conciliation Service in an attempt to reach agreement on a new contract. The Union's initial proposal provided for no change in the sick leave clause and set forth May 1, 1973, as the effective date for a new collective-bargaining contract. Respondent's counterproposal, which would delete article XVII of the expired contract's sick leave clause, provided, in pertinent part:

ARTICLE XVII

Sick Leave

1. Sick Leave. Employees shall accumulate forty (40) hours of sick leave with pay in any one (1) contract year. Sick leave shall accumulate at the rate of three and one-third (3-1/3) hours per month. Sick leave benefits shall be payable commencing the employee's second scheduled working day of sickness. When an individual is hospitalized, benefits shall be payable commencing on the first day. A doctor's certificate must be presented to the Company in order to receive sick leave benefits.

2. Amount of Pay. Payment for sick leave days shall be for an eight (8) hour day.

3. Sick Leave Bank. Sick leave allowance shall be used only for bona fide illness of an employee on his scheduled work days. Any unused sick leave shall be accumulated into a sick leave bank of not more than thirty (30) days. Unused sick leave shall be accumulated into a sick leave bank of not more than three hundred (300) hours; said bank to be used for the future illness of an employee as his needs may require. Sick leave used shall be deducted from the accumulated bank.

In addition, Respondent proposed that the effective date of the new contract occur on the first of the month following an agreement on a new contract.

During the meeting of January 7, 1974, with the mediator present, it became apparent to both sides that an impasse had been reached as to the parties' position on the sick leave plan. Thereafter, Respondent formally served notice on the Union of its intention to put into effect the terms of its counterproposal.⁵ Respondent's final proposal was put into effect on January 15, 1974. The only immediate effect of the amendment to the contract was to reduce the rate at which sick leave was being accrued by unit employees.

The sick leave provision proposed by Respondent was essentially identical to that appearing in a large

number of contracts which the Union had with other employers. The Union and Respondent understood that Respondent's proposed sick leave clause would not provide for payment of accrued sick leave as severance pay on an employee's termination, as did the existing clause. However, at no time during the negotiations did either party discuss the question of what effect, if any, Respondent's proposed revision would have on an employee's right at termination to draw separation pay in lieu of sick leave which had accrued either prior to termination of the old agreement or prior to the effective date of the new agreement.

On December 21, 1973, seven employees were laid off for approximately 2 weeks. These employees were paid their accrued vacation benefits and that portion of their sick leave which had accrued prior to May 1, 1973. Although the contract was silent on employees' rights in the case of temporary layoffs, it had been the past practice of Respondent and its predecessor to treat temporary layoffs as permanent terminations for vacation and sick leave purposes.

One of the seven employees contacted a business representative of the Union in order to obtain severance pay for the sick leave he had accrued for the period of May 1 through December 21, 1973. The Respondent contended that the employee was not entitled to the pay. The business representative informed the employee that the Union could not assist him due to pending bargaining negotiations. The employee filed an unfair labor practice charge against Respondent alleging a violation of Section 8(a)(5) and (1) of the Act in Respondent's failure to pay accrued sick leave for the period May 1 through December 21, 1973, to the employees laid off on the latter date. Respondent voluntarily paid the employees and the charge was withdrawn.

On March 18, 1974, the unit employees began an economic strike. Thereafter, Respondent hired permanent replacements for the striking employees. During the period between April 18 and August 1, 1974, the 15 striking unit employees terminated their employment with Respondent. Each striking employee was paid his accrued vacation time but was not paid for his accrued sick leave.⁶ On July 24, 1974, the Union disclaimed interest in the unit and withdrew its picket lines.

Douvier and Gar Isham, two strikers, terminated their employment on July 25 and August 1, 1974, respectively. The Douvier and Gar Isham terminations occurred subsequent to the withdrawal of the picket line, whereas all other terminations occurred prior to the end of the strike. Gar Isham was subsequently rehired by Respondent but was not credited with accrued sick leave.

⁵ Respondent, by letter dated January 9, 1974, advised the Union of its final position in the form of a proposed amendment to the expired contract. The letter indicated that unless the proposed amendment was accepted by the Union within 5 days, the Company intended to place into effect the terms of the amendment.

⁶ Three of the 15 strikers (Ben Howard, Richard White, and Roy Denman) had no accrued sick leave as of the commencement of the strike

There is no disagreement as to the existence of a bargaining impasse, nor is it disputed that an employer may affect unilateral changes in working conditions by putting into effect its last offer preceding the impasse.⁷ However, the General Counsel contends that if such unilateral change is to be valid the terms of the employer's last proposal must be reasonably comprehended within its preimpasse proposals, "that is, after good-faith negotiations have exhausted the prospects of concluding an agreement, an employer does not violate the Act by making unilateral changes that are reasonably comprehended within his preimpasse proposals."⁸ The General Counsel argues that the implications of Respondent's proposal to discontinue severance pay in lieu of sick leave were never discussed during negotiations. Therefore, Respondent's proposal could not reasonably be comprehended or interpreted by the Union or employees to mean that severance pay in lieu of sick leave accrued prior to May 1 and during the hiatus period from May 1, 1973, to January 15, 1974, would be discontinued, especially since other contract clauses were intended to have a prospective application.

Stipulated facts show the Union and the Respondent understood that the proposal on its face would discontinue severance pay in lieu of sick leave. However, the proposal offers no explanation as to the time frame for Respondent's proposal. There was no discussion during negotiations as to whether Respondent's proposal would affect sick leave accrued prior to the expiration of the old contract, May 1, 1973; or whether it would discontinue sick leave accrued between May 1, 1973, and January 15, 1974; or whether its effect would only apply to sick leave accrued after January 15, 1974.

The bargaining history reveals Respondent intended the proposal to have a prospective, not retroactive, application. During the early bargaining sessions the Union proposed that the new contract be made effective from May 1, 1973, the termination date of the old contract. The effect of the Union's proposal would have made contract terms and benefits retroactive, since an agreement would not have been reached until after May 1, 1973. Respondent rejected this date and proposed that the effective date be the first of the month following agreement on a new contract. The result of Respondent's proposed date would have made contract terms and benefits effective *in futuro*. During another bargaining session the Union offered October 1, 1973, as an effective contract date. Respondent again insisted that the first of the month following agreement be the effective contract date.

Moreover, according to the Respondent's notification to the Union, the amendment providing for rate reduction of accrued sick leave from 8 hours per month to 3-1/3 hours per month was to become effective on January 15, 1974.⁹ On January 15, 1974, Respondent placed its amendment into effect; the only immediate effect of the amendment was to reduce the rate at which sick leave was being accrued by unit employees.

Further, after the filing of unfair labor practice charges Respondent paid employees temporarily laid off on December 21, 1973, for accrued sick leave from May 1 to December 21, 1973, a period after the expiration of the old contract. Thus, it is difficult not to interpret Respondent's proposal as meaning that until January 15, 1974, severance pay in lieu of accrued sick leave would continue.

We find Respondent's argument that the Union was aware of the impact of Respondent's proposal because the Union had similar clauses to that proposed by Respondent in other contracts to be without merit.¹⁰ There is no evidence which indicates the Union understood that a retroactive effect was intended for Respondent's proposal relative to sick leave, while all other proposals by Respondent were to have only prospective effect. Therefore we find that Respondent's sick leave proposal was intended to have prospective effect only, but that consequently Respondent violated Section 8(a)(5) and (1) by unilaterally applying its postimpasse proposal, discontinuing severance pay in lieu of accrued sick leave, retroactively.

IV THE REMEDY

Having found that by the aforementioned conduct Respondent has violated Section 8(a)(5) and (1) of the Act, we shall order it to cease and desist from engaging in such conduct in the future and take certain affirmative action designed to effectuate the policies of the Act.

As we have found Respondent's proposal to discontinue severance pay in lieu of accrued sick leave effective as of January 15, 1974, did not apply to sick leave accrued prior to January 15, 1974, we shall order Respondent to reimburse terminated employees for all accrued sick leave which they had on the books as of January 15, 1974, with interest at 6 percent in the manner set forth in *Isis Plumbing & Heating Co.*, 138 NLRB 716 (1962).

⁹ The Union was aware that January 15, 1974, would act as the amendment's effective date because Respondent's letter of January 9, 1974, to the Union stated, "The enclosed Amendment is our Company's final position. If the enclosed Amendment is not accepted within five (5) days, we intend to place into effect the terms of the Amendment."

¹⁰ The fact that such clauses appeared in other contracts in no way indicates that the Union had ever previously encountered the situation in which this clause would replace language of the sort contained in Respondent's old contract.

⁷ *Taft Broadcasting Co., WDAF AM-FM TV*, 163 NLRB 475 (1967), *enfd. sub nom. American Federation of Television and Radio Artists, AFL-CIO, Kansas Local v. N.L.R.B.*, 395 F.2d 622 (C.A.D.C., 1968).

⁸ *Supra*, 478.

CONCLUSIONS OF LAW

1. Ace Galvanizing, Inc., is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America, Local Union No. 174, is a labor organization within the meaning of Section 2(5) of the Act.

3. At times material herein the Union was the exclusive representative of the employees in the following described unit for the purposes of collective bargaining within the meaning of Section 9(a) of the Act:

All production and maintenance employees at the Employer's facility at 429 South 96th Street, Seattle, Washington, excluding office clericals, professional employees, guards, and supervisors as defined by the Act.

4. By refusing to pay terminated employees severance pay in lieu of accrued sick leave pursuant to terms of an expired labor agreement prior to the date Respondent put into effect its final offer, Respondent engaged in unfair labor practices violative of Section 8(a)(5) and (1) of the Act.

5. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that the Respondent, Ace Galvanizing, Inc., Seattle, Washington, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Refusing to pay terminated employees, pursuant to terms of the expired contract, severance pay in lieu of sick leave accrued prior to January 15, 1974.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of

rights guaranteed in Section (7) of the Act.

2. Take the following affirmative action designed to effectuate the policies of the Act:

(a) Upon request, pay terminated employees, pursuant to terms of the expired contract, severance pay for all sick leave accrued under the expired contract and during the period of May 1, 1973, to January 15, 1974.

(b) Post at its place of business located at 429 South 96th Street, Seattle, Washington, copies of the attached notice marked "Appendix."¹¹ Copies of said notice, on forms provided by the Regional Director for Region 19, after being duly signed by Respondent's representative, shall be posted by Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(c) Notify the Regional Director for Region 19, in writing, within 20 days from the date of this Order, what steps the Respondent has taken to comply herewith.

of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

WE WILL pay terminated employees, pursuant to terms of the expired contract, severance pay for all sick leave accrued under the expired contract and during the period of May 1, 1973, to January 15, 1974.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of rights guaranteed in Section (7) of the Act.

ACE GALVANIZING, INC

¹¹ In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order